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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EARL'S PUMP AND SUPPLY COMPANY, INC.,
Petitioner,

v.

COLBERG, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTION PRESENTED

Did the California court correctly hold, notwithstanding this Court's opinion in *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190 (1983), that Congress intended the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905, to preempt the states' indemnity rules designed to distribute tort liability for workplace accidents?

PARTIES

Petitioner, and cross-complainant below, is Earl's Pump and Supply Company, Inc.

Joining petitioner, and also cross-complainant below, is Graco, Inc.

Respondent, and cross-defendant below, is Colberg, Inc.

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Petitioner,

v.

COLBERG, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioner, Earl's Pump and Supply Company, Inc. ("Earl's Pump"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal entered on November 30, 1984. Graco, Inc. joins in this petition.

OPINION BELOW

The opinion of the California Court of Appeal, *Graco, Inc. et al. v. Colberg, Inc.*, 162 Cal.App.3d 322 (1984), appears in the Appendix.

JURISDICTION

The judgment of the California Court of Appeal, dismissing the cross-claims of Earl's Pump and Graco, Inc., was entered on November 30, 1984. A timely petition for hearing by the California Supreme Court was denied on February 13, 1985, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) in order to resolve conflicting judicial decisions and an important

question, Supreme Court Rule 17.1(c), concerning the scope of federal preemption of state indemnity rules intended by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 ("LHWCA").

STATUTORY PROVISIONS INVOLVED

The text of United States Code, Title 33, Section 905, appears in the Appendix.

STATEMENT OF THE CASE

1. Introduction

Petitioner's action for equitable indemnity or contribution under California tort law was dismissed on demurrer. The dismissal was upheld by the California appellate court on the sole ground that Congress intended the exclusive liability provisions of the LHWCA to preempt the equitable indemnity rights established by California law. (A-5,6,15)

This Court, however, has held that Congress did *not* intend the "virtually identical" provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), to preempt state indemnity laws. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 199. Indeed, the *Lockheed* opinion all but holds that the same result obtains under the LHWCA, and the District Court of Maine followed *Lockheed* accordingly in *All Maine Asbestos Litigation (BIW Cases)*, 589 F.Supp. 1563 (D.C.Me 1984). The *All Maine* decision was brought to the attention of both California appellate courts below.

This petition is brought, therefore, to resolve a conflict of authority and an important question of federal law, Supreme Court Rule 17.1(c), concerning the scope of federal preemption in a highly sensitive setting—where federal/state relationships are significantly implicated; where the supposed federal preemption of state indemnity rules would sharply constrict tort liability apportionment in major coastal areas affected by the LHWCA; and where such constriction would affect major subjects of public policy and litigation such as asbestosis.

2. The Litigation Below

Robert Corales was a journeyman painter employed by respondent, Colberg, Inc. ("Colberg"), at its ship retrofitting facility in Stockton, California. He died while painting a navy barge being overhauled. Colberg had negligently failed to provide adequate ventilation and proper grounding of the high pressure paint spray equipment used by its employee, causing a fatal explosion of accumulated gases.[1] Corales' heirs received LHWCA benefits.

Under LWHCA section 905(a), the heirs were prohibited from suing Colberg in tort. Instead, they sued petitioner, Earl's Pump, the supplier of the paint spray equipment, as well as Graco, Inc., the equipment manufacturer. Earl's Pump and Graco, Inc. Each cross-claimed against Colberg for indemnity and contribution under settled California law. But their cross-claims have now been dismissed on the sole basis of a supposed Congressional intent to preempt the California indemnity and contribution rules as to employers who pay LHWCA benefits.[2] (A-5, 6) The California Court of Appeal framed "the determinative question on appeal" as follows:

> [W]hether the exclusiveness of liability provisions of LHWCA preclude a third party from obtaining contribution from an employer who has paid benefits under that act. (A-6)

The California Supreme Court denied a subsequent petition for hearing (A-15), rendering the Court of Appeal's finding of

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[1] These facts were alleged in petitioner's cross-complaint. Under California procedural law, they are deemed true at this stage of the proceedings. *Ramsden v. Western Union*, 71 Cal.App.3d 873, 879 (1977).

[2] Other grounds relied on at the trial court level were either rejected or not reached by the appellate court. Notably, the appellate court rejected Colberg's principal claim, that federal maritime law applied and did not allow indemnity claims as a matter of substantive law. (A-3-5) Although it thus found California tort law applicable, the court next found that law preempted by the LHWCA. (A-15)

federal preemption the controlling authority in California. Earl's Pump brings this petition for a writ of certiorari to review that outcome.

REASONS FOR GRANTING THE WRIT

1. The Supposed Federal Preemption Would Defeat California Law and Policy Within Their Legitimate Sphere

Well settled California law and public policy[3] would be significantly frustrated by a rejection of Earl's Pump's claim for equitable indemnity and contribution (hereinafter, both will be referred to as "indemnity"). Indeed, were it not for the expansion of federal powers in other contexts,[4] the California court's view that Congress intended to preempt state law and policy here would be most surprising.

California's commitment to the equitable apportionment of damages among all joint tortfeasors extends even to employers protected from tort indemnity claims under its own workers' compensation law, unlike the LHWCA. California's policy was recently summarized by the California Supreme Court in *Associated Constr. & Engineering Co. v. Workers' Compensation Appeals Bd.*, 22 Cal.3d 829, 841 (1978):

> [California law allows] the third party defendant to "shift part of the responsibility for the judgment rendered to the employer's carrier" . . . .
>
> [T]o the extent allowed by the employer's statutory liability [under applicable compensation laws], the employer and third party should share liability as would ordinary concurrent tortfeasors.

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[3] *See American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578 (1978).

[4] As Justice O'Connor recently observed:

> Today, as federal legislation and coercive grant programs have expanded to embrace innumberable activities that were once viewed as local, . . . the extraordinary has become the ordinary. *Garcia v. San Antonio Metro. Transit Auth.*, 53 L.W. 4135, 4151 (1985) (O'Connor, J., dissenting)

California laws providing for the equitable distribution of tort liability form an integral part of its policy to protect workers from injury, and third party tort defendants from unconscionable and economically disruptive tort burdens. (*See infra,* pp. 9-11.) These rules for apportioning tort responsibility and safety incentives are clearly within California's legitimate interests. As this Court noted in *Alaska Packers Ass'n v. Industrial Accident Comm'n,* 294 U.S. 532, 550 (1935), workers belong to "a class the protection of which the State has an especial interest." *See also Carroll v. Lanza,* 349 U.S. 408, 413 (1955).

The California court's erroneous decision to censor its own laws and abandon legitimate state interests, in deference to its finding of federal preemption, should be corrected by this Court. California should be given here the right it was granted in an analogous setting in *Alaska Packers,* 294 U.S. at 550: "The right to enforce its own laws in its own courts."

2. Congress Did Not Intend the Preemption Found Below

In *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, this Court held that FECA section 8116(c) does not bar tort-based, third-party indemnity claims against the government as employer. In reaching that conclusion, the Court relied heavily on the "virtually identical" exclusivity provisions of the LHWCA. The *Lockheed* opinion is irreconcilable with the California court's finding that Congress intended the LHWCA to preempt state indemnity policies.

Lockheed repeatedly refers to the LHWCA as the model and mirror image of the FECA. At the outset, this Court observed that Congressional intent underlying the FECA and the LHWCA were the same:

> This compromise is essentially the same as that found, for example, in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[4]
>
> * * *
>
> [4]*The FECA exclusive-liability provision was modeled on the analogous provisions of LHWCA and the New York*

> *Workmen's Compensation Law.* (460 U.S. at 194, emphasis added)

The *Lockheed* Court then noted that "by 1949 the New York courts already had construed the New York law to permit third-party indemnity actions against the employer" (460 U.S. at 194 n.4), plainly implying that *both* the New York compensation law and the LHWCA allowed the indemnity claims at issue here. As this Court observed in *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 276 (1980):

> Nothing in the original legislative history of the Federal [LHWCA] Act or in the legislative history of subsequent amendments indicates that Congress did not intend the plain language of the federal statute to receive the same construction as the substantially identical language of its New York ancestor.

This Court's previous decisions had also held that the analogous provisions of the New York compensation law, the LHWCA, and the FECA should be construed in the same way. Indeed, *Lockheed* expressly relied on *Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597 (1963), which found the LHWCA authoritative in FECA cases:

> The Weyerhaeuser court reinforced its conclusion with a discussion of the "nearly identical" LHWCA provision . . .
>
> The Court's reasoning in Weyerhaeuser applies with equal force in the present case. (460 U.S. at 195-196)

The *Lockheed* majority also observed that lower court decisions finding that the LHWCA precluded third-party indemnity claims[5] were not supported by its decision in *Halcyon Lines v.*

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[5] These cases, decided prior to *Lockheed,* construed the LHWCA to preclude indemnity actions against negligent employers. As argued above, *Lockheed* should have corrected the erroneous construction of congressional intent in LHWCA, just as it corrected the same constructional error in FECA cases, such as *Adams v. General Dynamics Corp.,* 535 F.2d 489 (9th Cir. 1976), *cert. denied,* 432 U.S. 905 (1977), *Kudelka v. American Hoist & Derrick Co.,* 541 F.2d 651 (7th Cir. 1976), and *Travelers Ins. Co. v. United States,* 493 F.2d 881 (3d Cir.

(Footnote continued on following page)

Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). That case:

> . . . merely held that a substantive right of contribution did not exist in the circumstances of that case. The Court explicitly left open the issue whether such a right to contribution, if it were to exist, would be subject to LHWCA's exclusive-liability provision. (460 U.S. at 197 n.8)

The *Lockheed* opinion did note a single difference between the FECA and LHWCA in this area—a 1972 amendment of the LHWCA restricting third-party actions *against shipowners*. That amendment is by its terms applicable only to cases of "injury . . . caused by the negligence of a vessel. . . ." 33 U.S.C. § 905(b). The instant case is not covered by the amendment. This Court's recent review of the language and legislative history of the amendment in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) and *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983), found no additional Congressional intent to affect parties other than longshoremen, stevedores and vessels (shipowners). *See also Pippen v. Shell Oil Co.*, 661 F.2d 378, 387 (5th Cir. 1981); *Holden v. Placid Oil Co.*, 473 F.Supp. 1097, 1099 (E.D.La. 1979). However, the California court, following authority preceding *Lockheed*, found that Congress did intend a broader preemption of all state indemnity remedies. The continued viability of the pre-*Lockheed* authorities should now be resolved by this Court.

Finally, *Lockheed* rejected federal preemption of state claims against employees where there was a much stronger argument for federal preemption than here. In *Lockheed*, the employer exposed to tort indemnity liability was the Government itself. In contrast, the federal purse is not at stake here, and certainly no federal interest promotes the inequitable allocation of tort burdens in the private sector, or an inefficient and economically disruptive distribution of safety incentives. (*See infra*, pp. 9-11)

1974). The California court's erroneous decision following pre-*Lockheed* authorities provides an occasion for this Court to clarify the intended scope of *Lockheed's* protection of state indemnity policy.

In sum, the decision below misread Congressional intent. As *Lockheed* stressed, third parties such as petitioner—strangers to employment contracts—obtain no benefit from the federal compensation scheme, and likewise suffer no loss of state indemnity remedies. 460 U.S. 190, 195. Had Congress wished to defeat "settled doctrines" of state indemnity law to exclude non-vessels' (non-shipowners') indemnity actions, it could easily have done so. But Congress did not seek to preempt the array of states' indemnity laws and policies within their "especial" concerns. The decision below ignored Mr. Justice Frankfurter's admonition on how to listen to a statute: "One must also listen attentively to what it does not say."[6]

3. Conflicting Decisions Concerning LHWCA Preemption of State Indemnity Law Should Now Be Resolved

The only other court directly presented with this issue after *Lockheed* fully agreed with petitioner's conclusion that the LHWCA does not preempt state indemnity rights.[7] In *All Maine Asbestos Litigation (BIW Cases)*, 589 F.Supp. 1563 (D.C.Me 1984), which involved hundreds of asbestos claims, the District Court of Maine held:

> [T]he *Lockheed* interpretation of FECA's exclusive liability provision applied with equal force to the "nearly identical" LHWCA provision, 33 U.S.C. § 905(a). *Id.* at 1567.

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[6] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. R. 527, 536 (1947).

[7] Earlier, although without a direct holding, the Fourth Circuit refused to affirm a district court's holding "that the exclusivity provision of the LHWCA, 33 U.S.C. § 905(a), bars any non-contractual indemnity from the employer to a third party." *White v. Johns-Manville Corp.*, 662 F.2d 243, 247 (4th Cir. 1981). The Fourth Circuit had previously anticipated *Lockheed* in finding that the FECA did not bar non-contractual indemnity claims against the government. *Wallenius Bremen G.M.B.H. v. United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970)

The reasoning of that opinion is directly contrary to the California appellate decision questioned here. The Maine district court concluded:

> [T]here is no evidence either in the language of the statute or in the congressional history that Congress addressed itself to, or was in any way concerned with, the rights of non-vessel owner third parties. *Id.*

Resolving the conflict of authority is now vital. California is a major coastal jurisdiction with frequent LHWCA litigation. This petition implicates the same rights of third parties which required authoritative resolution in *Lockheed.*

4. Federal Interests *Oppose* Any Preemption of California Indemnity Law in This Context

The Congressional deference to state interests in this area, as found in *Lockheed* and *All Maine*, is not only laudable as a matter of federalism. Federal deference allows and encourages the states to develop better policies to distribute tort liability equitably and reduce the social costs and incidence of workplace accidents. This *federal* interest is served by Congress' decision in the FECA and the LHWCA not to interfere with diverse and dynamic state policies to attain the described goals.

Imposing a federal preemption of state indemnity remedies would create an inefficient, inequitable, and, for longshoremen and harbor workers, dangerous policy of risk and liability distribution. This case aptly illustrates the point. Colberg's negligence caused the death of its employee in a gas explosion. Yet, the happenstance of Colberg's payment of compensation benefits under a federal scheme, rather than the California scheme, would insulate Colberg from *any* financial accountability for its negligence.[8]

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[8] California, unlike the LHWCA, denies or reduces negligent employers' reimbursement for benefits paid when the employee recovers from third parties. *Associated Constr. & Engineering Co. v. Workers' Compensation Appeals Bd.*, 22 Cal.3d 829, 841. The only remaining California remedy against a negligent employer paying LHWCA benefits is the

(Footnote continued on following page)

Such a federal preemption would be both inequitable and economically inefficient. Although Colberg is in the best position to minimize the risk of workplace injury to its employees,[9] Colberg would be left with no financial incentives to do so. Inequitable distribution of liability simultaneously maldistributes incentives for risk reduction, leaving workers inadequately protected. Moreover, forcing third parties such as petitioner to shoulder the full burden of common law remedies increases the social costs of occupational injuries and distorts economic markets.[10]

For these reasons, statutory exclusivity provisions are being questioned in both state and federal courts.[11] The historically assumed *quid pro quo* underpinning exclusivity provisions once seemed fair; the common law left most injured workers uncompensated.[12] However, because modern tort principles better protect injured workers, the assumptions underlying the "bargain" struck for workers in compensation laws are much less tenable today.

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indemnity claim. The decisions below thus defeated California's *sole* tort basis to protect longshoremen and harbor workers from the negligence of their employers.

[9] *Report of the National Commission on State Workmen's Compensation Laws* 39 (1972).

[10] Where third parties must pay common law benefits, the costs of accidents are internalized in the wrong industry and the economic advantages from loss spreading are reduced. *See* G. Calabresi, *The Costs of Accidents*, 24-34 (1970).

[11] *See* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 Harv. L. R. 1641 (1983); *see also*, in LHWCA context, *American Mut. Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197 (5th Cir. 1979).

[12] *See* W. Prosser, *Handbook of the Law of Torts*, § 80, at 526, 530 n.32 (4th ed. 1971) (70% to 94% uncompensated); *see also Compendium on Workmen's Compensation* 11 (Nat'l Comm'n on State Workmen's Compensation Laws ed. 1973) (workers recovered in 15% of injuries, although 70% involved employer negligence or work-place conditions).

The inequity of unintended and unjustified exclusions of tort indemnity, and the inefficiencies, injuries, and deaths caused by the resulting maldistribution of occupational safety incentives, all militate against a wooden imposition of a federal preemption of state indemnity policies. The history of workers' compensation admonishes us that it takes dynamic policies to keep pace with a changing economic order. [13]

Congress' strategy of protecting important federal interests by deferring to state policies is neither novel nor controversial. Because "the science of government . . . is the science of experiment," *Anderson v. Dunn,* 6 Wheat. 204, 226 (1821), the state "laboratories" for social and economic experiment have proved indispensable to sound federal policy.[14]

As Justice Brandeis eloquently observed:[15]

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single

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[13] Ironically, the very concerns of equity and efficiency at issue here inspired the statutory compensation programs now questioned. Statutory compensation schemes were established to equitably distribute liability and efficiently foster industrial safety. *See* E. Downey, *Workmen's Compensation* (1924); E. Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality,* 25 Harv. L. Rev. 129, 130-131, 136 (1911); W. Dodd, *Administration of Workmen's Compensation* 26 (1936).

[14] The Federal Tort Claims Act (28 U.S.C. § 2671, *et seq.*), for example, expressly provides that the federal interests involved in tort suits against the government are to be balanced by evolving state tort and indemnity law. Under 28 U.S.C. § 2674, federal tort liability is determined in accordance with state law "in the same manner and to the same extent as a private individual under like circumstances . . . "

[15] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

The *Lockheed* and *All Maine* decisions were sensitive to the federal interest in the free development of state policies to allocate occupational risks and liabilities. Yet that development is now threatened by a decision, in a major jurisdiction, that Congress intended "to stay experimentation" in a vital industrial context.

CONCLUSION

For the reasons outlined, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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(Appendix follows)

Appendix

In the Court of Appeal
of the
State of California

Civ. No. 23432.
Third Dist.
Nov. 30, 1984

GRACO, INC., et al.,
Cross-complainants and Appellants,

v.

COLBERG, INC.,
Cross-defendant and Respondent.

OPINION

SPARKS, J.—The issue in this appeal is whether defendant tortfeasors in a wrongful death action may maintain cross-actions against the employer of the decedent for contribution or indemnity based upon the employer's alleged negligence when the employer has paid death benefits under the Federal Longshoremen's and Harbor Workers' Compensation Act (LHWCA). (33 U.S.C. § 901 et seq.) The trial court ruled they could not and consequently entered a judgment dismissing the cross-complaints of Graco, Inc., and Earl's Pump and Supply Company, Inc., after it sustained the demurrers of the employer, cross-defendant Colberg, Inc., without leave to amend. We agree and shall affirm.

FACTS

The parties have submitted the appeal upon a stipulated joint appendix pursuant to California Rules of Court, rule 5.1, and the facts are not in dispute. On October 29, 1980, decedent Robert Corales was employed by Colberg at its Stockton boat works. On that date he was engaged in painting a United States Navy barge and was using an airless spray painter manufactured by Graco and sold to Colberg by Earl's Pump and Supply. Fumes which had accumulated in the work area were ignited by a spark from the

spray painter and in the resulting explosion Corales suffered injuries from which he ultimately perished. Colberg's insurance carrier, Industrial Indemnity, paid death benefits to Corales' widow and minor children pursuant to LHWCA.

This litigation commenced when Corales' widow and children filed a complaint in the San Joaquin County Superior Court for damages against Graco and Earl's Pump and Supply. The complaint sought damages for wrongful death based upon causes of action for negligence and for strict products liability. Graco and Earl's Pump and Supply cross-complained against each other. Neither defendant originally sought contribution or indemnity from Colberg. The basis for their failure to proceed against Colberg was the exclusiveness of liability provisions of LHWCA and their acknowledgement that those provisions had been construed to preclude actions against an employer who had paid benefits under LHWCA.[1]

In early 1983 the United States Supreme Court rendered its decision in *Lockheed Aircraft Corp. v. United States* (1983) 460 U.S. 190 [74 L.Ed.2d 911, 103 S.Ct. 1033]. In that case the court considered whether the exclusiveness of liability provisions of the Federal Employees' Compensation Act (FECA) (5 U.S.C. § 8101 et seq.), which utilizes language similar to LHWCA, precluded a third party tort defendant from seeking indemnity from the governmental employer in an action brought by an injured employee. The court held that the provisions of FECA do not bar such an action, and in doing so noted the similarity in the FECA and LHWCA provisions. Although the decision in *Lockheed* involved FECA rather than LHWCA, both Graco and Earl's Pump and Supply assert that the reasoning of the decision is applicable to LHWCA. They were allowed to amend their cross-complaints to seek contribution and/or indemnity from the decedent's employer, Colberg, on the ground that Colberg was

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[1] In California, that construction was initially adopted by a federal district court in *S.S. Seatrain Louisiana, etc. v. Cal. Stevedore* (N.D.Cal. 1976) 424 F.Supp. 180, and was subsequently reiterated by the state Court of Appeal in *IT Corp. v. Superior Court* (1978) 83 Cal.App.3d 443 [147 Cal.Rptr. 828].

negligent in failing to ground the barge on which the decedent was working as a precaution against sparks.

Colberg demurred to the cross-complaints. The trial court found that federal maritime law governs all aspects of the litigation, that maritime law precludes a cross-action for indemnity by third party tortfeasors against an employer who has paid LHWCA benefits, that the decision in *Lockheed* is not controlling, and that even under state law the cross-actions would be barred by Labor Code section 3864.[2] The court sustained the demurrers without leave to amend and entered a judgment dismissing the cross-actions as to Colberg. This appeal followed.

DISCUSSION

I

The parties vigorously dispute whether the issues in this case are controlled by the California law of torts or by federal maritime law. The trial court concluded that maritime law governs all aspects of the case. We must disagree with that conclusion. This appeal involves only the alleged tortious conduct of Colberg as a basis for contribution or indemnity; there are no allegations of implied or express contractual rights at issue. The appellants have

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[2] Labor Code section 3864 provides: "If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury." Because we conclude that LHWCA precludes these cross-actions against the employer, we do not seek to unravel the tangled relationship between state workers' compensation acts and LHWCA. Consequently, we do not reach the issue whether these indemnity cross-actions may also be independently barred by Labor Code section 3864 without infringing upon the federal supremacy clause. For an extensive analysis of the relationship between state workers' compensation laws and LHWCA, see 4 Larson, Law of Workmen's Compensation (1984) sections 89-89.74, page 16-165 and following.

simply alleged, in accordance with the decision in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], that Colberg's negligence caused the injury to the decedent and therefore Colberg should be required to contribute to the recovery, if any, obtained by the plaintiffs.

The tests for determining whether an action falls within or without the jurisdiction of admiralty differ between actions based upon contracts and those based upon torts. The test whether a contract action is within the jurisdiction of admiralty depends upon the maritime nature of the subject matter of the contract, and neither the place where the contract is made, nor the place where its obligations are to be performed is determinitive. "In matters of contract, jurisdiction is governed by the maritime nature of the transaction, irrespective of locality." (1 Benedict on Admiralty (7th ed. 1983) § 141, p. 9-5; see also 2 Am.Jur.2d, Admiralty, § 61, p. 754.) Thus, "[i]f the nature and character of the contract is maritime, that is to say, if the contract is related to a maritime service or a maritime transaction, there is admiralty jurisdiction." (1 Benedict on Admiralty, *supra*, § 182, p. 11-5, fn. omitted.) In contrast, whether a tort is "maritime" has traditionally depended upon the locality of the wrong. *(Executive Jet Aviation v. City of Cleveland* (1972) 409 U.S. 249, 253 [34 L.Ed.2d 454, 458, 93 S.Ct. 493]; see also 2 Am.Jur.2d, Admiralty, § 81, p. 765.) A tort committed on navigable water has been considered maritime; a tort committed on land has not. *(Ibid.* See *Victory Carriers, Inc. v. Law* (1971) 404 U.S. 202, 211-212 [30 L.Ed.2d 383, 391, 92 S.Ct. 418].) "Historically, admiralty jurisdiction in tort cases depended upon the locality of the wrong. If the tort occurred upon the high seas or navigable waters, the tort action was within admiralty jurisdiction. *The Plymouth,* 70 U.S. (3 Wall.) 20, 35-36, 18 L.Ed. 125 (1866)." (*Myhran v. Johns-Manville Corp.* (9th Cir. 1984) 741 F.2d 1119, 1120.)

In *Executive Jet Aviation v. City of Cleveland* (1972) 409 U.S. 249 [34 L.Ed.2d 454, 93 S.Ct. 493], the United States Supreme Court modified the situs or location test for determining whether a tort is within the jurisdiction of admiralty by holding that in the

case of a tort committed on navigable water it must also appear that "the wrong bear a significant relationship to traditional maritime activity" before admiralty jurisdiction arises. (409 U.S. at p. 268 [34 L.Ed.2d at p. 467].) In short, the high court held in *Executive Jet* that in tort cases "maritime locality alone was insufficient to invoke admiralty jurisdiction." (*Myhran v. Johns-Manville Corp., supra,* 741 F.2d at p. 1120.) In doing so, however, the court supplemented rather than replaced the traditional location requirement. (*Harville v. Johns-Manville Products Corp.* (11th Cir. 1984) 731 F.2d 775, 781.) In order for admiralty jurisdiction to apply to tortious conduct, the tort must still occur at a maritime location. (*Ibid.*) "Thus it continues to be true that, in the absence of contrary legislation, '[a]dmiralty jurisdiction' does not 'extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea.' *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360, 89 S.Ct. 1835, 1839, 23 L.Ed.2d 360 (1969)." (*Lowe v. Ingalls Shipbuilding, A Div. of Litton* (5th Cir. 1984) 723 F.2d 1173, 1187.)

In this case the barge upon which the accident occurred had been hauled up out of the water on Colberg's marine railway and was not upon navigable water. The claims of the appellants sound in tort, arising as they do solely out of allegations that Colberg's negligence caused the accident. This being so, the situs or location requirement for admiralty jurisdiction, upon which the application of maritime law depends, has not been shown. Accordingly, we hold that the trial court erred in determining that maritime law governs all aspects of this case. (See *Victory Carriers, Inc., v. Law, supra,* 404 U.S. at p. 205 [30 L.Ed.2d at p. 387].)[3]

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[3] *Fahey v. Gledhill* (1983) 33 Cal.3d 884 [191 Cal.Rptr. 639, 663 P.2d 197], relied upon by Colberg, is not to the contrary. That case involved the validity of an exculpatory contract and the court simply held that the validity of a maritime contract must be determined under maritime law. (33 Cal. 3d at pp. 890-894.)

II

This brings us to the determinative question on appeal: whether the exclusiveness of liability provisions of LHWCA preclude a third party from obtaining contribution from an employer who has paid benefits under that act. Although we have held that maritime law does not control all aspects of this case, it is clear that LHWCA is applicable. The applicability of LHWCA is not coterminous with the limits of admiralty jurisdiction. That this is true is made clear by the history of LHWCA.[4] At first, Congress attempted to give injured employees within admiralty jurisdiction the right to proceed under state compensation laws, but these congressional efforts were declared unconstitutional. (*Southern P. Co. v. Jensen* (1917) 244 U.S. 205, 218 [61 L.Ed. 1086, 1099, 37 S.Ct. 524].) Congress then enacted LHWCA in 1927. (44 Stat. 1424, 33 U.S.C. § 901 et seq. (1927).) As originally enacted, LHWCA excluded employees outside of the admiralty jurisdiction who could be covered by state compensation laws. (Former 33 U.S.C. § 903.) This limitation proved awkward because it lacked uniformity, contained uncertainties in its coverage, and resulted in many employees literally walking in and out of coverage during their workday. (See *Northeast Marine Terminal Co. v. Caputo* (1977) 432 U.S. 249 [53 L.Ed.2d 320, 97 S.Ct. 2348].) In 1972 LHWCA was amended to abrogate the rule that coverage stopped at the water's edge and to include within its scope workers such as the decedent in this case.[5] (*Id.*, at p. 262

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[4] The historical development of the workmen's compensation law for longshoremen and harbor workers is traced in 1A Benedict on Admiralty (7th ed. 1983) chapter I, page 1-1 and following.

[5] By the 1972 amendments, Congress extended coverage shoreward by broadening the definition of "navigable waters of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (33 U.S.C. § 903) "But with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate. It therefore added the requirement that the injured

[53 L.Ed.2d at p. 332].) However, the 1972 amendments did not oust the states of jurisdiction over what had formerly been considered matters of local concern. (*Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715, 722 [65 L.Ed.2d 458, 464, 100 S.Ct. 2432].) The jurisdiction of LHWCA now coexists with state jurisdiction in the areas where state law may constitutionally operate. *(Ibid.)* In this case it is clear that LHWCA was applicable and it is undisputed that benefits were paid pursuant to that act. Accordingly the trial court correctly concluded that the exclusiveness of liability provisions of LHWCA are applicable.

Section 5 of LHWCA (33 U.S.C. § 905), provides: "(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

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worker be 'engaged in maritime employment,' which it defined to include 'any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but . . . not . . . a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.' 33 USC § 902(3) (1970 ed., Supp V) [33 U.S.C.S. § 902(3)]." (*Northeast Marine Terminal Co. v. Caputo* (1977) 432 U.S. 249, 264 [53 L.Ed.2d 320, 333, 97 S.Ct. 2348], fn. omitted.) As a ship repairman killed while working on a vessel in dry dock, decedent was clearly covered under LHWCA.

"(b) In the event of injury to a person covered by this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

Appellants acknowledge that prior to the United States Supreme Court decision in *Lockheed* the exclusiveness of liability provisions of LHWCA had been construed to preclude any actions for indemnity or contribution against an employer based on allegations of negligence. We are satisfied that the clear weight of authority so held. (*See Zapico v. Bucyrus-Erie Co.* (2d Cir. 1978) 579 F.2d 714, 719 [47 A.L.R.Fed 399]; *White v. Texas Eastern Transmission Corporation* (5th Cir. 1975) 512 F.2d 486, 489-490; *Davis v. Chas. Kurz & Co., Inc.* (9th Cir. 1973) 483 F.2d 184, 187-188.) The California appellate courts which considered the issue also adhered to this interpretation of LHWCA. *(IT Corp. v. Superior Court* (1978) 83 Cal.App.3d 443, 451 [147 Cal.Rptr. 828]; *Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co.* (1975) 52 Cal.App.3d 305, 312 [125 Cal.Rptr. 111]. See also *Schreefel v. Okuly* (1983) 143 Cal.App.3d 818, 826 [192 Cal.Rptr. 402].) Thus, at least prior to the decision in *Lockheed,* appellants' claims against Colberg based upon negligence would have been subject to demurrer. The question here is whether the decision in *Lockheed* compels a different result.

Lockheed arose out of the crash of an aircraft built by Lockheed and operated by the United States Air Force. A civilian employee died in the crash and her survivors were paid benefits under the Federal Employees' Compensation Act (FECA). (5 U.S.C. § 8101 et seq.) The employee's administrator filed a suit against Lockheed as the manufacturer of a defective product, and Lockheed sought indemnification from the government under the Federal Tort Claims Act. (28 U.S.C. §§ 1346(b), 2671 et seq.) The government did not deny that its negligence caused the accident, but sought immunity from Lockheed's claim under the exclusiveness of liability provisions of FECA. Those provisions, contained at 5 United States Code section 8116(c), state: "The liability of the United States . . . under [FECA] . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . because of the injury or death . . . . "

The *Lockheed* court noted that it had previously construed FECA in *Weyerhaeuser S. S. Co. v. U.S.* (1963) 372 U.S. 597 [10 L.Ed.2d 1, 83 S.Ct. 926]. That case involved a mutual fault collision between two vessels, one of which was owned by the government. The long-settled admiralty rule in such cases, referred to as the divided damages rule, required each vessel to pay to the other one-half of its proven damages. The government was subject to an admiralty suit under the Public Vessels Act (46 U.S.C. § 781 et seq.), and the vessels complained against each other. The dispute arose over whether Weyerhaeuser could include in its damages an amount it had paid in settlement of a suit brought by a government employee who had been paid benefits under FECA. The court noted that the Public Vessels Act was intended to impose upon the government the same liability which a private shipowner would bear and that under the same circumstances a private party would be required to contribute to the settlement costs of Weyerhaeuser. The court considered the history of FECA and found that its exclusive liability provisions were intended to concern only the relationship of the government and its employees, and their representatives and dependents.

There was no evidence that Congress intended to affect the rights of unrelated third parties, nor to disturb settled doctrines of admiralty law governing the mutual rights of shipowners in collision cases. (372 U.S. at p. 601 [10 L.Ed.2d at p. 51].) The court held that the divided damages rule must prevail over a statute limiting the liability of a shipowner to unrelated third parties and the rule was therefore unaffected by FECA. (*Id.*, at pp. 603-604 [10 L.Ed.2d at pp. 6-7].)

The *Lockheed* court held that the decision in *Weyerhaeuser* was equally applicable to the dispute in *Lockheed.* (460 U.S. at p. 196 [74 L.Ed.2d at p. 918].) The court noted that in the 20 years since the *Weyerhaeuser* decision Congress had not modified the provisions of FECA to overrule that decision. This was particularly significant to the court because the exclusiveness of liability provisions had been recodified and modified in other particulars. (*Id.*, at p. 196, fn. 6 [74 L.Ed.2d at p. 918].) The court rejected the claim that *Weyerhaeuser* had involved a balancing of the provisions of FECA against the divided damages rule, and concluded that the decision "relates simply to congressional intent." (*Id.*, at p. 195, fn. 5 [74 L.Ed.2d at p. 918].) The provisions of FECA did not directly bar a claim for indemnification or contribution against the government. (*Id.*, at p. 199 [74 L. Ed.2d at p. 920].)

Lockheed did not involve the exclusiveness of liability provisions of LHWCA and consequently does not directly control the issue in this case. Nevertheless, this appeal must be considered in light of the decision in *Lockheed* due to the manifest similarity of the language of FECA and that of LHWCA. Indeed, the *Lockheed* court noted this similarity. (*Id.*, at p. 194 [74 L.Ed.2d at p. 917].) Appellants contend that the reasoning of *Lockheed* compels a similar result with respect to LHWCA. We disagree. Both *Weyerhaeuser* and *Lockheed* were based upon the complete absence of indications that Congress intended to affect third party rights in FECA. We find a different intent in LHWCA and we conclude that *Lockheed* is not controlling.

We begin our discussion with the decision in *Halcyon Lines v. Haenn Ship Corp.* (1951) 342 U.S. 282 [96 L.Ed. 318, 72 S.Ct.

277]. In that case Halcyon Lines hired the Haenn Corporation to make repairs on its ship which was moored in navigable waters. An employee of Haenn was injured through the combined negligence of Halcyon and Haenn and recovered damages against Halcyon. Halcyon sought contribution from Haenn. The Supreme Court denied such a claim, holding that there was no right to contribution among joint tortfeasors in a noncollision maritime case. The court found it unnecessary to consider whether LHWCA barred the claim because a substantive right of contribution had not been recognized and "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." (342 U.S. at p. 287 [96 L.Ed. at p. 321].)

In *Pope & Talbot, Inc. v. Hawn* (1953) 346 U.S. 406 [98 L.Ed. 143, 74 S.Ct. 202], the Supreme Court summarily affirmed the denial of a claim for contribution under the *Halcyon* circumstances, but a related issue required resolution. It appeared that the employer had paid LHWCA benefits to the employee which, pursuant to agreement and under LHWCA, it would be entitled to recoup from the employee's judgment. The shipowner argued that the amount of the LHWCA benefits should be offset from the judgment because to allow the employee to keep them would amount to double recovery and to allow the employer to keep them would reward it for its negligence. The Supreme Court noted that the employer's recovery of the benefits was required by LHWCA, and said "[the shipowner's] contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the Act. Moreover, reduction of [the shipowner's] liability at the expense of [the employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case." (346 U.S. at p. 412 [98 L.Ed. at p. 152].)

In *Cooper Stevedoring Co. v. Kopke, Inc.* (1974) 417 U.S. 106 [40 L.Ed.2d 694, 94 S.Ct. 2174], a ship was partially loaded by a stevedoring company at one port and then proceeded to another port for further loading by another stevedoring company. An employee of the second stevedoring company was injured at least

in part due to the negligence of the first stevedoring company. The employee was granted judgment against the shipowner and the shipowner was given the right of contribution against the first stevedoring company on the ground that the decision in *Halcyon* is limited to situations where the alleged joint tortfeasor is immune from tort liability by statute. The Supreme Court agreed. It noted that the underlying basis of the decision in *Halcyon* was the limitation of liability of an employer under LHWCA and stated that this concern still has much force; indeed *Halcyon* is still good law on its facts. (417 U.S. at pp. 112, 115 [40 L.Ed.2d at pp. 701-702].) However, where a party is not obligated under LHWCA and is therefore not entitled to the exclusiveness of liability provisions of that act, then contribution is to be permitted. (*Ibid.*).

While the court has consistently refused to permit an employer to become indirectly liable for an employee's injuries beyond its LHWCA liability where the claim for contribution was based on tort, a partial encroachment on the employer's immunity arose in another context. Under admiralty law a shipowner could be held strictly liable for the failure to provide a seaworthy ship. In *Seas Shipping Co. v. Sieracki* (1945) 328 U.S. 85 [90 L.Ed. 1099, 66 S.Ct. 872], the court held that this duty was not limited to seamen, but extended to longshoremen employed by a stevedore to load a ship in port. Thus an injured longshoreman could receive LHWCA benefits from his employer and bring an action against the shipowner on strict liability principles. In *Ryan Co. v. Pan-Atlantic Corp.* (1955) 350 U.S. 124, at pages 130 to 133 [100 L.Ed. 133, at pages 140-142, 6 S.Ct. 232], a shipowner sought indemnification from an employer stevedore on the ground that the ship was rendered unseaworthy by the stevedore's failure to fulfill its contract to load the ship in a workmanlike manner. The Supreme Court noted that the claim was not for contribution from a joint tortfeasor, and was not based upon any duty or obligation of the stevedore to its employee; rather the claim was based upon the stevedore's voluntary and self-sufficient contract with the shipowner and was therefore not precluded by the provisions of LHWCA. Although the decision in *Ryan* was based upon a contractual relationship between the stevedore and the

shipowner, in later cases recovery was upheld where the contractual relationship was considerably more attenuated. (See *Weyerhaeuser S. S. Co. v. U.S., supra,* 372 U.S. at p. 603 [10 L.Ed.2d at p. 6].)

In 1972 Congress acted to abrogate the decision in *Ryan.* Former section 5 of LHWCA (33 U.S.C. § 905), became subdivision (a) and subdivision (b) was added to section 905. In subdivision (b) the strict liability action for unseaworthiness was abrogated. An injured employee may bring an action against a vessel, but only on the basis of the vessel's negligence and in that event "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements to the contrary shall be void." The effect of this amendment was to overrule the decision in *Ryan* to the extent it made an employer circuitously liable for injuries to its employees. (*Cooper Stevedoring Co. v. Kopke, Inc., supra,* 417 U.S. at p. 113, fn. 6 [40 L.Ed.2d at p.701].) The congressional intent expressed in the amendment is clear: it was to end the circuity of actions in which an employer might be liable in excess of its LHWCA responsibilities to the end that the employer's resources be used to provide improved benefit levels rather than to defray the costs of multiple liabilities. (See *Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co., supra,* 52 Cal.App.3d at pp. 311-312, and the excerpt from the congressional record published there in fn. 1.)

From this discussion it can be seen that the judicial and congressional history of FECA and LHWCA differ completely despite the similarity of the language in each. In *Lockheed* the court recognized that the issue was solely one of congressional intent. The congressional record revealed no intent to preclude contribution actions against the government under FECA, and although the court had allowed such actions 20 years earlier Congress had made no effort to abrogate that decision. In contrast, the court has consistently refused to permit an action against a maritime employer based upon its alleged negligence as a basis for contribution. Although the court has found it unnecessary to expressly base its decisions upon LHWCA, the decision in *Cooper* leaves no doubt that those provisions are an important

consideration. "Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned." (*Edmonds v. Compagnie Generale Transatl.* (1979) 443 U.S. 256, 273 [61 L.Ed.2d 521,535, 99 S.Ct. 2753].) To the extent the high court had earlier permitted a circuity of actions whereby an employer could be indirectly liable for an employee's damages, Congress acted in clear and certain terms to abrogate such a judicial construction by enacting the 1972 amendments to LHWCA. The congressional record reveals a clear intent that such circuitous actions should not be permitted.

We finally note a strong policy reason for rejecting appellants' claims. As we have previously noted, prior to the 1972 amendments to LHWCA, the application of the act stopped at the water's edge, and therefore there was a substantial disparity in treatment of maritime workers depending upon which side of the water an accident occurred. (See *Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at pp. 721-722 [65 L.Ed.2d at p. 464].) The 1972 amendments to LHWCA resolved this disparity by extending the scope of LHWCA landward. (33 U.S.C. § 903.) Congress wanted a uniform system of compensation which would not depend upon the fortuitous circumstance of whether the accident occurred over land or over water. *(Northeast Marine Terminal Co. v. Caputo, supra,* 432 U.S. at 272 [53 L.Ed.2d at p. 338].) To accept appellants' arguments would defeat this purpose by once again injecting disparity into LHWCA depending upon the location of the accident. In short, an employer would either be liable or immune from contribution depending upon whether the accident occurred over land or over water. Since the "horns of the jurisdictional dilemma press as sharply on employers as on employees" (*Davies v. Department of Labor* (1942) 317 U.S. 249, 255 [87 L.Ed. 246, 249, 63 S.Ct. 225]), such a result is clearly contrary to the purpose of the 1972 amendments of LHWCA.

For these reasons on we do not find the decision in *Lockheed* with respect to FECA to be controlling in this case involving LHWCA. Instead, we adhere to the decisions in *IT Corp. v. Superior Court, supra,* 83 Cal.App.3d at page 451, and *Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co., supra,* 52 Cal.App.3d at page 312. Under those decisions the trial court correctly sustained Colberg's demurrers.

The judgment is affirmed.

Puglia, P. J, and Mering, J.,* concurred.

In the Supreme Court
of the
State of California
3 Civil 23432

February 13,1985

Graco, Inc., et al.,

v.

Colberg, Inc.

ORDER

Hearing Denied

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* Assigned by the Chairperson of the Judicial Council.

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of this employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was

employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

(As amended Sept. 28, 1984, Pub.L. 98-426, § § 4(b), 5(a)(1), (b), 98 Stat. 1641.)

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No. 84-1802

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EARL'S PUMP AND SUPPLY COMPANY, INC. and GRACO, INC.
Petitioners,

v.

COLBERG, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the California court correctly hold that, notwithstanding this Court's opinion in *Lockheed Aircraft Corp. v. United States*, (1983) 460 U.S. 190, concerning the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, Congress intended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, to preclude a third party from obtaining indemnity or contribution from an employer who has paid benefits under that Act?

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No. 84-1802

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EARL'S PUMP AND SUPPLY COMPANY, INC. and GRACO, INC.
Petitioners,

v.

COLBERG, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate in describing (1) the indemnity rights Petitioners' claim under "well settled California law", (2) what other lower federal courts have held regarding the scope of § 905, (3) what Congress intended by that section, and (4) what this Court has "held" with regard to employer indemnity under the LHWCA.

(1) California Labor Code § 3864 bars non-consensual employer indemnity, and *American Motorcycle Ass'n. v. Superior Court*, (1978) 20 C.3d 578, 607 n.9, expressly excepts such indemnity from its ruling (relied on by Petitioners) that all negligent parties may be liable in indemnity or contribution for injuries caused by them. What Petitioners attempted to obtain below was the avoidance of the aforementioned settled law by contending that payments made under LHWCA (rather than the State Act) erase both the statutory bar and express exception in *American Motorcycle* for employer indemnity liability.

(2) Petitioners omit the fact that the district court in *All Maine Asbestos Litigation (BIW) Cases*, 589 F. Supp. 1763

(D.C.Me. 1984) in fact *barred* employer indemnity because of an exclusive remedy provision in its State Act, holding it applicable to LHWCA covered injuries as well as those covered by the State Act. Petitioners further *ignore* the other two district court decisions subsequent to *Lockheed Aircraft Corp. v. United States*, 460 U.S. 90, 1035 S.Ct. 1033 (1983), which expressly *rejected* the application of FECA cases to LHWCA cases on employer indemnity because of their different legislative and decisional histories. Such were the rulings in *Krzywicki v. Lash Barge P1-1-0325*, (D.Md. 1983) (1984 A.M.C. 1367, and *Murphy v. Mississippi Barge Line Co.*, (N.D.Ill., No. 82-C-937), decided November 18, 1983 and published by Lexis, a copy of which opinion is attached.

(3) The intent of Congress under LHWCA has been markedly different regarding the rights of employers paying the insurance premiums necessary to fund the high benefits under the LHWCA, as opposed to its intent regarding the need for protection of the United States government as employer under FECA. The decision below (Appendix to Petition, p. 8-14) pointed out the difference in history between FECA and LHWCA indemnity claims against employers and held *Lockheed* did not intend a change in the existing law on employer indemnity under the LHWCA. Further, the legislative history, written *subsequent* to *Lockheed* concerning recent amendments to § 905, evidences that continuing intent by explaining that the Conference Substitute between the Senate and the House adopted without change the rule of exclusive liability for shipbuilders in the Senate bill, which the legislative history states was intended to bar employer indemnity:

> "Further, the bill, anticipating that a shipbuilder may be indirectly exposed to liability above compensation through actions by third parties grounded on theories of contractual or tort indemnity or contribution, bars those actions as well." (*4 U.S. Code Congressional and Administrative News*, 98th Congress, 2d Session 1984, pp. 2773-4)

(4) This Court in *Lockheed* pointed out that its decision was clearly *limited* to the exclusive remedy provision of FECA *only* (103 S.Ct. at 1038), and further pointed out at footnote 8 that the

LHWCA cases "are entirely irrelevant" to its decision on the FECA provision.

Lastly, Petitioners' statement of the case omits the reliance by the decision below on the need for *uniformity in treatment of waterfront employment claims*, which would outweigh any state local tort interest (even if different from the federal rule) in coastal areas (Pet. A-14). In so holding the court below merely followed an earlier California decision reiterating that need for uniformity, in *Schreefel v. Okuly*, (1983) 143 Cal.App.3d 818, 825.

In summary, Petitioners' statement of the case fails to establish a reason to support the granting of *Certiorari* in this case.

NO REASONS FOR GRANTING THE WRIT EXISTS

1. The Decision Below Does Not Disturb California Law, Which Also Denies Employer Indemnity.

The petition cites *American Motorcycle, supra*, to establish what it claims to be "well settled" California law permitting employer indemnity. As explained above, California Labor Code § 3864 expressly precludes such indemnity excepting by prior written agreement:

> "If an action as provided in this Chapter prosecuted by the employee, employer or both jointly against a third person results in judgment against such person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third party harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury period."
>
> (California Labor Code § 3864, enacted 1959.)

Section 3864 was enacted to "overrule" *San Francisco Unified School District v. California Building Maintenance Company*, 162 Cal. App. 2d 434 (1958), which had adopted the then-new federal implied-in-fact contract of indemnity theory created by the Court in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 (1956). *See*, 2A Larsen, Workmen's Compensation Law, §§ 76.20 and 76.80.

Thus, Labor Code § 3864 *restated* the general rule against employer indemnity and expressly covered the new *Ryan* theory so as to return the law to its status before the *School District* case. Petitioners below attempted to *avoid* the aforementioned law by claiming that since compensation herein was paid under the LHWCA rather under than the state act, § 3864 did not apply. Yet personal injury claims against non-employers undeniably *predate* the compensation acts and exist without reference to them. This fact is even codified in California Labor Code § 3852 which states:

> "The claim of an employee for compensation does not affect his claim or right of action for damages proximately resulting from such injury or death against any person other than the employer."

In any event what possible policy difference could apply based upon under which act the compensation was furnished?

Moreover, *American Motorcycle* expressly excepts employer indemnity cases from its reach:

> "There are, of course, a number of significant exceptions to this general rule. For example, when an employee is injured in the scope of his employment, Labor Code § 3864 would normally preclude a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concurrent cause of the injury."
>
> (*Id.*, at 607, n.9)

Petitioners also rely on *Associated Constr. & Engineering Co. v. Workers Compensation Appeals Bd.*, 22 Cal.3d 829 (1978) to support California's "policy." Yet, *Associated* relates only to third parties defending against a *compensation* lien. That is not the issue before this Court, nor was it the issue before the court below, and Petitioners make no contention here that it applies to this case. (Petition, p. 9, fn. 8)

It is clear from Labor Code § 3864 and the reason for its passage, to avoid the effect of the *Ryan* doctrine, that it is neither the California law nor public policy to have employers indemnify third party defendants for injury claims brought by their

employees. Thus, Petitioners' attempt to create a "Catch 22" situation permitting employer indemnity only where payments were made under LHWCA rather than the state act would itself conflict with the California law and policy.

2. Congress Did Intend to Bar Non-Consensual Indemnity by LHWCA Employers.

As the court below noted:

> "Appellants acknowledge that prior to the United States Supreme Court decision in *Lockheed* the exclusiveness of liability provisions of LHWCA had been construed to preclude any actions for indemnity or contribution against an employer based on allegations of negligence. We are satisfied that the clear weight of authority so held."

(Petition, A-8.)

The court below then discussed the theories of cases from *Halcyon Lines v. Haenn Ship Corp.* (1951) 342 U.S. 282, through *Cooper Stevedoring Co. v. Kopke, Inc.* (1974) 417 U.S. 106, (Petition, A-10-12) pointing out that the rule enunciated in *Halcyon* precluding employer tort indemnity under LHWCA was still pronounced "good law" in *Kopke*. These cases concerned the LHWCA prior to the 1972 amendments, during which time this Court held in *Nacerima Operating Co. v. Johnson* (1969) 396 U.S. 212, 217, that the LHWCA was then *co-extensive* with the then existing traditional admiralty *situs* jurisdiction rule, which stopped at the dockside (except for drydocks). Thus, the law as established from the passage by Congress of the LHWCA in 1927 to its 1972 amendments was all under traditional admiralty maritime jurisdiction. It was this background that was the distinguishing factor between the LHWCA and FECA, because the latter, as shown by this Court in *Lockheed,* looked to the applicable *state* law rather than any underlying federal law for its substantive law.

The court below next considered whether the Congress in 1972 intended to *change* the then existing rule precluding employer indemnity under LHWCA payment conditions (A-13). The court reviewed the "partial encroachment on the employers'

immunity" based upon the implied *contract* theory developed in *Ryan, supra.* (A-12.) The Court below then held the 1972 amendments were intended to abrogate the *Ryan* decision which had been the *only* "partial encroachment" on the employers' immunity. The Court below then found the congressional intent:

> "The congressional intent expressed in the amendment is clear: it was to end the circuity of actions in which the employer might be liable in excess of his LHWCA responsibilities to the end that the employer's resources be used to provide improved benefit levels rather than defray the costs of multiple liabilities. (See *Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co., supra,* 52 Cal.App.3d at pp. 311-312, and the excerpt from the Congressional Record published therein, fn.1.)"
>
> (A-13)

The decision below then pointed out that the "judicial and congressional history of FECA and LHWCA differ completely despite the similarity of the language of each." (A-13.) It then properly drew the inescapable conclusion:

> "To the extent the high court had earlier permitted a circuitry of actions whereby an employer could be indirectly liable for an employee's damages, Congress acted in clear and certain terms to abrogate such a judicial construction by enacting the 1972 amendments to LHWCA. The Congressional Record reveals a clear intent that such circuitous actions should not be permitted."
>
> (A-14.)

We note that this Court in *Lockheed* expressly held LHWCA cases to be "entirely irrelevant" to the question before it regarding the FECA provision. (*Lockheed, supra,* fn.8.) Further, the Court ended its decision in *Lockheed* by stressing that it related only to FECA, which was because of the different congressonal intent with respect to *that* Act. (*Lockheea, supra,* 103 S.Ct. at 1038.)

The petition refers to the alleged similarity between New York state law as to indemnity claims against employers and federal LHWCA law. However, New York state courts have themselves

consistently disallowed third-party indemnity claims in tort against LHWCA employers, (*Bottalico v. Todd Shipyards Corp. et al.* (1980) 107 Misc. 2d 942; 436 N.Y. Supp. 2d 112; *Magno v. Waterman Steamship Lines* 1983 A.M.C. 360, 362 (NYAD, 1983)).

The petition cites *Potomac Electric Co. v. Director OWCP*, 449 U.S. 268, 276 (1980) as showing similarity between the two Acts. *Potomac* did not concern interpretation of the exclusive liability of employers under LHWCA. It concerned only the calculation of diability benefits under LHWCA.

Similarly, *Weyerhauser S.S. Co. v. U.S.*, 372 U.S. 597 (1963), a 1963 FECA case, is obviously no kind of authority on the legislative history of the 1972 amendments to LHWCA. *There is no equivalent in FECA to the LHWCA amendments,* as pointed out by *Lockheed* and the court below (A-9-10, 13-14).

The petition also overlooks the decisions of our own local jurisdictions which expressly interpret the 1972 amendments as evidencing congressional intent to bar all employer non-consensual indemnity cases to stop circuity of action and permit maximum benefits to reach the injured employees. (*SS Seatrain Louisiana, etc. v. California Stevedore* (N.D.Cal. 1976) 424 F.Supp. 180; *Schreefel v. Okuly* (1983) 143 Cal.App.3d 818; *I.T. Corp. v. Superior Court* (1978) 83 Cal.App.3d 443.) Likewise, the petition overlooks the two post-*Lockheed* District Court decisions from the other districts noting the distinction between historical background and obvious congressional intent between FECA and LHWCA: *Krzywicki v. Lash Barge P.L. 1-0325* (D.Md. 1984) 1984 A.M.C. 1367; *Murphy v. Mississippi Barge Line Co.* (N.D. Ill. 1983) No. 82-C-937 (attached).

The most recent legislative history, written subsequent to *Lockheed,* concerning the 1984 amendments to Section 905, explains that the Conference Substitute between the Senate and the House adopted without change the rule of the exclusive liability for shipbuilders proposed in the Senate bill, which the legislative history states was intended to bar employer indemnity:

> "Further, the bill, anticipating that a shipbuilder may be indirectly exposed to liability above compensation through

> actions by third parties, grounded on theories of contractual or tort indemnity or contribution, bars those actions as well."
>
> (4 U.S. Code, Congressional and Administrative News, 98th Congress, 2d Session 1984, p. 2773-4.)

It is apparent that this post-*Lockheed* legislative history evidences legislative intent *continuing* from the 1972 amendments to roll back any attempt to *create* employer non-consensual indemnity where none had existed since the original passage of the Act in 1927.

Perhaps inadvertently, the petition at page 7 points out the distinction between the facts in *Lockheed* involving the federal government's own uninsured liability under FECA, and the asserted indemnity liability of a private insured employer over and beyond his compensation obligations under LHWCA, which necessarily would hamper his ability to fund the increased benefits under the Act brought about by the 1972 amendments. Thus, contrary to the Petition's assertions, the further imposition of additional tort liability on a private employer beyond his increased compensation insurance costs would be detrimental to the LHWCA system and the need for uniformity.

3. No Decisions Grant LHWCA Employer Tortious Indemnity and No Conflict Exists.

Although conflict in decisions is not a ground for *Certiorari* under Rule 17(c), in any event, no decision grants employer indemnity against an LHWCA employer. The only case urged by petitioner, the *All Maine* case, expressly *denied* employer indemnity under the state act. This is in marked contrast to the many other decisions cited hereinabove supporting the decision below and explaining the long-standing congressional intent since the inception of the Act in 1927 against employer indemnity and the need for uniformity in the handling of waterfront employee-injury claims.

Moreover, two other 1984 District Court decisions, without even discussing *Lockheed's* ruling on the exclusive remedy provision in FECA, noted that Section 5 of LHWCA bars employer non-consensual indemnity: *Bradford v. Indiana &*

Michigan Elec. Co. (S.D.W.Va. 1984) 588 F.Supp. 708, 715; *Triguero v. Consolidated Rail Corporation* (S.D.N.Y. 1984) 585 F.Supp. 1202, 1203. Accordingly, there is no conflict between *any* decisions on the issue sought to be heard in this Court.

4. Federal Interest in Uniformity Would Outweigh Any Conflict with California Law Were One to Exist.

As pointed out above, the petition constructs an argument indicating an alleged "conflict" between the decision below and "well settled California law", when in reality the California law applicable to a non-consensual employer indemnity is the same as the result reached by the decision below. Petitioners propose a "Catch-22" situation urging a *different* and special result here merely because payments were made under LHWCA rather than the state act. The rationale for any such special result for Petitioners in this case falls before the well recognized need for uniformity of waterfront employer-employee injury claims matters. The aforementioned recent legislative history surrounding the 1984 amendments to the Act reiterate this congressional intent to secure employers from indemnity liability beyond the generous LHWCA benefits payable due to the high compensation insurance premiums paid by employers:

> "S. 38 as reported by the Committee on Education and Labor, is intended to reduce the cost of Longshore coverage for employers in the covered industries in a manner which will disturb, to the most limited extent possible, the rights and benefits which the Longshore Act provides." (4 U.S. Cong. and Adm. News, 98th Cong., 2d Sess. 1984, p. 2736)

5. In Any Event, the Case Below in Fact Involved Traditional Maritime Jurisdiction Over Marine Railway Drydock Accidents.

The California District Court of Appeal below erred in its *dicta* (Petition, A-5) that the admiralty jurisdiction *situs* requirement had not been shown because the "barge upon which the accident occurred had been hauled up out of the water on Colberg's marine railway and was not upon navigable water." (A-5.)

The erroneous *dicta* by the Court of Appeal below was apparently based upon the over-simplification of the words "navigable waters", which over-simplification was treated by this Court in *Nacirema Operating Co. v. Johnson, supra,* 396 U.S. 217, and again adverted to by this Court in *Director, etc. v. Perini North River Associates* (1983) 459 U.S. 297, 103 S.Ct. 634. *Johnson* recognized that the traditional inclusion of drydocks as a proper admiralty *situs* existed even though they were not floating, stating:

> "If Congress had thought the words 'upon the navigable waters' were broad enough to embrace the limits of admiralty jurisdiction, there would have been no need to include the parenthetical 'including any drydock'."
>
> (396 U.S. at 217, fn.10)

In fact, it was at the specific suggestion (396 U.S. at 224) of this Court in *Johnson* that Congress enacted the 1972 amendments *increasing* the scope of LHWCA shoreward *beyond* the traditional admiralty jurisdiction. Thus, although the scope of the LHWCA *now* clearly exceeds that of traditional admiralty jurisdiction based solely upon *situs*, it did not prior to the 1972 amendments under *Johnson.* This was again made clear in *Perini, supra,* where this Court stated:

> "We use the expression 'actual navigable waters' to describe the covered situs as it existed in the 1927 LHWCA, 44 Stat. 1424.: 'Navigable waters of the United States (including any drydock).' 44 Stat. 1426. As explained below, the 1972 amendments to the LHWCA expanded the concept of 'navigable waters' to include certain adjoining shoreside areas. Section 3(a) 33 U.S.C. § 903(a)."
>
> (103 S.Ct. at 638, fn.2)

As the Supreme Court had also previously noted, a marine railway is but a type of drydock and is within the admiralty jurisdiction even if, as with any other drydock. the ship is temporarily over land instead of the water. (*Avondale Marine Ways v. Henderson* (1953) 346 U.S. 368, 369.)

The decision below in its erroneous *dicta* relied on a quote from *Rodrique v. Aetna Casualty & Surety Co.* (1969) 395 U.S. 352, 360. The quotation is:

> "The admiralty jurisdiction. . . [does not] extend to accidents on piers, jetties, bridges or even ramps or railways running into the sea."
>
> (395 U.S. at 360)

The quotation from *Rodrique*, which predated *Johnson*, is not support, in light of this Court's pronouncements in *Johnson* and *Perini*. *Rodrique* involved the question of whether a man-made island on the Outer Continental Shelf was within the admiralty jurisdiction. It was held that the island was like a pier or other land structure built out over the water, and hence was not in admiralty jurisdiction. The quotation from *Rodrique* referred to "railways running into the sea". A marine railway is much more than a railway running into the sea. It is a type of drydock consisting of a movable cradle, to permit repair of existing vessels, not movement of new vessels to the sea. (*O'Leary v. Puget Sound Bridge & Drydock Co.* (9th Cir. 1965) 349 F.2d 571, 573.) The cases cited by *Rodrique* in support of the quotation referred to pier and other land-extension cases, including *Hastings v. Mann* (4th Cir. 1965) 340 F.2d 910, which involved a launching ramp for small boats from car trailers, not a marine railway used for repair of ocean vessels. Thus the *Hastings* structure was similar to a pier used to bring things to the water.

Our research has produced one case which did not follow this Court's rulings holding marine railways to be the same as any other drydock and within traditional admiralty jurisdiction. That sole case is *Delome v. Union Barge Line Co.* (5th Cir. 1971) 444 F.2d 225. The court in *Delome* apparently equated traditional admiralty jurisdiction with "wet" navigable waters only and found it lacking because the barge therein was 65 feet inland and no part of it was actually then in navigable water. The court then agreed that there was no distinction "between marine railways and other types of drydocks" at page 231, and then at footnote 10, seemed to limit the application of the marine railway cases solely to coverage under LHWCA, erroneously assuming that LHWCA

coverage (before the 1972 amendments) *then* exceeded and differed from traditional admiralty jurisdiction.

While citing *Johnson*, the court in *Delome* failed to to recognize that this Court's holding in Johnson was that coverage under the Act (prior to 1972) was then *co-extensive* with traditional admiralty jurisdiction, which included marine railways and other drydocks even out of water. It was precisely this holding in *Johnson* on traditional admiralty jurisdiction which *precluded* coverage under the Act (before 1972) of an injury on a pier regardless of The Extension of Admiralty Jurisdiction Act of 1948 (46 U.S.C. § 740), passed substantially after the original act of 1927.

Thus, *Delome* failed to recognize the old "Hornbook law" which the Supreme Court had followed in its earlier decisions holding admiralty jurisdiction included marine railway drydock injuries. See *Robinson on Admiralty,* Hornbook Series (1939) p. 88:

> *"Personal Injury When a Ship is in Drydock.*
>
> * * *
>
> "But ships may be out of water on a purely land structure or out of water on a structure which itself is afloat. They may also be on a marine railway which stretches from land into water, and a vessel on it may itself be wholly or partially out of water. Actually, insofar as the cases go, these distinctions have been largely ignored, and the causes of action have been regarded as maritime even when the vessel at the time of the injury is not water-borne either directly or indirectly."

In summary, even were there a conflict between the California law regarding employer indemnity and the decision below, that decision's error in its aforementioned *dicta* regarding admiralty *situs* jurisdiction, if corrected or disregarded, would preclude the applicability of any alleged conflicting California law and thus would further make the decision below not a proper candidate for *Certiorari* before this Court.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should not issue to review the opinion below.

Respectfully submitted,
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(Appendix follows)

Appendix

BONNIE R. MURPHY, Administrator of Estate of George B. Murphy, deceased, Plaintiff. v. MISSISSIPPI VALLEY BARGE LINE CO., et al., Defendants.

No. 82 C 937

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Slip Opinion

November 18, 1983

OPINION BY: GRADY

OPINION: MEMORANDUM OPINION

This is an action under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq., arising out of the death of plaintiff's decedent, who was fatally injured while removing the cover of a docked barge. Plaintiff sued the owner of the barge (the "vessel"). The vessel, as third-party plaintiff, impleaded the designer, seller, and builder of the barge ("Caruthersville") as third-party defendant, for contribution or indemnity. Caruthersville, as fourth-party plaintiff, impleaded plaintiff's decedent's employer (the "Employer"), as fourth-party defendant have each filed a motion to dismiss. We deny the motion of third-party defendant and grant the motion of fourth-party defendant.

(1) *Caruthersville Motion to Dismiss*

Third party defendant Caruthersville has moved to dismiss Counts I and II of the third-party plaintiff vessel's complaint. Count I sounds in strict liability and seeks recovery either in contribution or indemnity. Count II sounds in negligence and also seeks recovery for contribution or indemnity.

Caruthersville argues that the vessel's third-party action is barred because there is no express or implied recourse to contribution of indemnity in the LHWCA for a vessel. Caruthersville argues that the LHWCA provides for no such action, and that the

1972 amendments to the LHWCA prohibit us from implying one. We reject Caruthersville's arguments.

It is true that the LHWCA does not expressly provide that a vessel may sue a third party for contribution or indemnity. However, contrary to defendant's suggestions, both such actions are well-recognized and well-established in admiralty law. See *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974) (contribution allowed against non-employer); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-272 n. 30 (1979) (contribution); *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) (indemnity). This nonstatutory right to contribution was fashioned by the Supreme Court pursuant to the unique authority to fashion flexible and equitable remedies in admiralty which the Constitution gives to federal courts. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95-96 (1981).

Caruthersville's reliance on the 1972 amendments is equally unavailing. In 1972, Congress amended the LHWCA to provide, in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. 33 U.S.C. § 905(b) (emphasis added).

By its terms, this amendment only alters a vessel's right to indemnity from the employer of the injured person. In our case, however, the vessel is suing Caruthersville, which was not the injured person's employer but rather was the designer, builder and seller of the ship. Therefore, the 1972 amendments would require us to deny Caruthersville's motion to dismiss. Accord, *Meekins v. Prudential Lines, Inc.*, 1981 A.M.C. 1740 (E.D. Va. 1979).

Caruthersville argues nonetheless that Congress, by limiting the vessel's right against the injured person's employer, has established a comprehensive remedial scheme which evidences an intent not to authorize additional remedies. Actually, the reverse is true. In *Edmonds, supra*, the Supreme Court held that because in the 1972 amendments Congress only limited the vessels's rights as against the employer, Congress meant not to disturb other, judge-made admiralty law:

> Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned. 433 U.S. at 273.

Therefore, since before the 1972 amendments there was a right in the vessel to contribution or indemnity against third-party non-employers. That right still exists unless Congress explicitly acted to remove it, which, as we have stated, Congress has not done.

Further, the Supreme Court has very recently stated that in the 1972 amendments, "Congress abolished the indemnity action only in conjunction with a 'quid pro quo' to benefit the third parties." *Lockheed Aircraft Corporation v. United States*, ____ U.S. ____, 103 S.Ct. 1033, 1038 (1983). Since the 1972 amendments did not include a similar quid pro quo to benefit vessels vis-a-vis a non-employer such as Caruthersville, the vessel's pre-1972 right to seek contribution or indemnity remains.

(2) *Employer's Motion to Dismiss*

As fourth-party plaintiff, Caruthersville brought a one-count complaint against the Employer for negligence and seek recovery on a theory of contribution. n.1 The Employer argues that Caruthersville's suit is barred because under *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), contribution in not available in an LHWCA case against the employer of the injured person.

n.1 Caruthersville argues in its response brief that "the underlying premises of the contribution count is the same as if it had been drafted seeking non-contractual indemnity." Caruthersville

then unilaterally decided to treat its complaint for purposes of this motion "as if it had included a separate count for non-contractual indemnity, it may file an amended complaint within 21 days. The Employer may within 21 days thereafter file any appropriate motion to dismiss, and we would at that time consider the sufficiency of the pleading.

In *Halcyon*, a vessel which had been sued by an injured employee sought contribution from the employer. The Court held that Congress had not provided for contribution in such a case. Twenty years later, in *Atlantic Coast Line Railroad Co., v. Erie Lackawanna Railroad Co.*, 406 U.S. 340 (1972), the Court, relying on *Halcyon*, held that a non-vessel also could not seek contribution from an employer in a suit by an injured employee. *Atlantic Coast* would seem to be directly on point here, since the fourth-party complaint, too, involves a non-vessel, Caruthersville, suing the Employer for contribution. However, a recent Supreme Court case, *Lockheed Aircraft Corporation v. United States*, ____ U.S. ____, 103 S.Ct. 1033 (1983), requires us to analyze the issue further.

In *Lockheed*, a civilian employee of the Navy died when a plane manufactured by Lockheed crashed. The government paid death benefits to the employee's survivors under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq., and the employee's administrator then sued Lockheed as the manufacturer of a defective product. Lockheed impleaded the government as a third-party defendant seeking indemnity. The government, relying on a limitation of liability provision in the FECA which is nearly identical to § 905(a) of the LHWCA, argued that it could not be sued.

Both the FECA and the LHWCA contain provisions which eliminate an employer's liability to injured employees, their families, people claiming through them or on their behalf, and "any other person entitled to recover" (FECA) or "anyone otherwise entitled to recover" (LHWCA). Lockheed held that the FECA limitation of liability provision did not bar Lockheed from seeking indemnity from the government. The Court held that the limitation of liability provision only ran in the government's favor when the government was sued by an employee or someone claiming

through the employee, but not when the government was sued by an unrelated third party. In other words, the Court held that an unrelated third party such as Lockheed was not included in the statutory category of "any other person entitled to recover."

The *Lockheed* Court basically relied on an earlier case, *Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597 (1963), which it found indistinguishable. However, the court also noted the 1972 LHWCA amendments, which as we discussed above, eliminated a vessel's right to seek indemnity against an injured person's employer. In eliminating that right, Congress also eliminated the employee's right to sue the vessel in strict liability. The *Lockheed* Court read those amendments to mean that it should not upset settled liability schemes under the FECA or the LHWCA unless Congress provided a similar tradeoff for the benefit of the party whose liability was sought to be expanded. Therefore, since Congress had not provided a tradeoff for the benefit of unrelated third parties in FECA cases, the Court would not eliminate the rights of unrelated third parties under *Weyerhaeuser* to sue the injured person's employer for indemnity.

Caruthersville argues that since *Lockheed* held that the FECA limitation of liability provision did not prevent an unrelated third party from seeking indemnity against an employer, the same result should be reached under the almost identical § 905(a) of the LHWCA. While this argument may be superficially appealing, it must fail for a number of reasons. First, Lockheed involved a suit for indemnity, rather than contribution, which is sought here. This difference is important because, at least until the 1972 amendments, third parties were allowed to sue employers on an indemnity theory under the LHWCA, see *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956), n2 but not on a contribution theory, see *Halcyon, supra.* Thus, Lockheed's comparison, for purposes of an indemnity suit, of the FECA and the LHWCA is not relevant to a LHWCA suit for contribution.

n2 The 1972 amendments, as *Lockheed* concludes, did not change the pre-1972 right of an unrelated non-vessel third party to seek indemnity from the employer of the injured person.

Second, and more important, the holdings in *Halcyon* and *Atlantic Coast* which Caruthersville asks us not to follow were not based on the LHWCA limitation of liability provision discussed in *Lockheed* but rather on the Court's holdings that on the facts of those cases, there was no basis for finding that Congress intended to allow an employer to be sued for contribution. *Halcyon, supra*, 342, n.8, 103 S.Ct. at 1037-8, n.8. Therefore, neither § 905(a) of the LHWCA nor a case such as *Lockheed* which interprets a similar statute applies here because under *Halcyon* and *Atlantic Coast*, § 905(a) is not of importance in deciding this question in the first place.

We conclude, therefore, that *Lockheed* does not overrule *Halcyon* and *Atlantic Coast* appears on all fours with our case, unless it has been overruled for some other reason it would still require dismissal of Carutherville's fourth-party complaint. The only possible event since *Atlantic Coast* was decided which might affects its vitality is the passage of the 1972 amendments. However, in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974), the court discussed *Halcyon* and *Atlantic Coast* and concluded that those cases were still good law on their facts even in light of the 1972 amendments. The *Cooper* Court, in fact, concluded that the 1972 amendments reinforced the rationale on which *Halcyon* and *Atlantic Coast* were based, that is, that as between an employer and its injured employee, the employee's right to compensation under the LHWCA should be the exclusive remedy against the employer. The 1972 amendments therefore left untouched the holdings in *Halcyon* and *Atlantic Coast* that Congress did not intend that an action for contribution would be available against the injured party's employer. Accord, *Nieves v. Douglas Steamship*, 451 F. Supp. 407 (S.C. N. Y. 1978). Further, as we stated in our earlier discussion, the court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), admonished that courts especially should not overturn settled maritime doctrines when Congress has acted in reliance upon those doctrines. Therefore, since Congress, in the 1972 amendments, did not affirmatively overrule *Halcyon* as it chose to do with other maritime doctrines, we will not read into the 1972 amendments an intent to change *Halcyon*.

Accordingly, we hold that Caruthersville's suit for contribution is barred by *Halcon* and *Atlantic Coast* and grant the Employer's motion to dismiss.

CONCLUSION

For the reasons discussed herein, we deny third-party defenddant's motion to dismiss and grant fourth-party defendant's motion to dismiss.